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by Leighton Aiken

One popular magazine features preteen girls showing off their genitals in a manner popularized by *Playboy* magazine. An 8mm film shows a ten year old girl engaging in fellatio and intercourse with her eight year old brother. In another film, members of a bike gang break into a church and rape six little girls. These materials represent some of the products of the booming, billion dollar industry of child pornography.

Child pornography first began to emerge in the late 1960's, in an "under-the-counter" fashion, in adult bookstores. Magazines, such as "Lollitots" and "Moppits," depicted little girls, generally between eight and fourteen years of age, posing nude. By the mid 1970's, as the appetite for such pornographic materials began to drastically increase, these materials began to display young children in every conceivable sexual pose and act, homosexual and heterosexual. Such materials now depict children as young as three years old in sexual activities with their peers of the same and opposite sex, or with adult men and women. These sexual activities run the gamut from lewd poses to intercourse, fellatio, cunnilingus, masturbation, rape, incest, and sado-masochism.

The reasons for the tremendous boom in the child pornography industry are uncertain. A respected psychologist at the University of Maryland Hospital suggests that as the social concern for obsessive personal pleasures began to subside, pedophiliac themes began to proliferate in our society. Whatever the reason, child pornographic materials appeal mainly to the pedophile. Robin Lloyd,[1] defines a pedophile as "an adult who is sexually attached to an immature child of either sex." In an article in *New Statesmen*, entitled "Child Pornography", the pedophile is further analyzed: "as he grows older he can no longer love the child he was then, as this child no longer exists, so he has to project on to other children, who become his prime love objects . . . He is, for example, Peter Pan fascinated by his shadow, Alice before her looking glass, Dorian Gray captive to his self-portrait."

Pedophiles provide a rapidly expanding market for child pornographic materials appealing to their special interests. Since these materials involve the use of children in their production, victims of child pornography are children. These exploited children are commonly lonely and hungry runaways, eager to pose for money, food or even a trip to Kings Dominion. However, not all sexually exploited children are runaways. Many come from broken homes, and some are even introduced to the business by their parents, many of whom were once pornographic models. Still other children in these materials are victims of incest. Parents will have sexual relations with an offspring, then exchange these pictures with other incestuous parents or send the photos of these relations to a publisher of pornography.

Absent effective federal legislation to deal with this matter, states, including Maryland, tried to control this burgeoning industry with pre-existing legislation. All states had sex offense statutes, which prohibited sexual acts, including rape, incest, and indecent or immoral conduct with minors. These statutory provisions could reach the producers of child pornography, but are applicable only where the adult actually molests the child, and not where the child merely poses alone or with other children. Additionally, evidence of molestation is difficult to obtain for two reasons. First, there is the problem of witness competency where the child is too young. Second, even where the child is deemed competent to testify, the child is often too afraid or confused to testify properly.

Child abuse laws, like MD. ANN. CODE art. 27, §35A, impose criminal liability on those persons convicted of physically abusing children. But this statute appears to be limited in scope with respect to child pornography. First, the children who are victims of this sexual abuse are hard to identify and locate. So are the producers of child porn who quite often hide behind a set of dummy corporations. Second, many child abuse statutes only impose liability on parents and guardians. Third, in some states, the penalty imposed for abuse of a child by an adult is only a misdemeanor, a relatively weak penalty provision in proportion to the seriousness of the crime. Finally, most child abuse statutes are ill-equipped to outlaw the psychological harm of a pornographic production.

The existing obscenity laws prohibit the dissemination and the production of any materials found to be legally obscene. Application of these statutes could effectively prohibit the use of children in legally obscene materials. However, these statutes would not provide relief for those children who are similarly photographed and sexually exploited, but whose pictures appear in works not judged obscene. As *Time Magazine* reported,[2] "to make prosecution easier, angry legislators in several states and Congress are proposing a kind of end run around the obscenity laws — a ban on sexually explicit pictures of children, whether legally obscene or not".

Reliance on obscenity laws to prevent the sexual abuse of children in visual materials traditionally rested on a

[1] Lloyd, Robin. *For Money or Love: Boy Prostitution in America.* Vanguard Press, New York, New York, (1976).

[2] "Child's Garden of Perversity", *Time*, vol. 107, no. 14, (April 4, 1977).

determination of "obscenity", with a total indifference to the resulting harm to the child. According to Larry E. Parrish, former Assistant U.S. Attorney, while such determinations were deemed relevant when applied to distributors where strong freedom of speech interests were involved, it did not apply to the producer's direct abuse of the child where no countervailing constitutional issues must be considered.

In sum, although many of these categories of existing laws were effective in dealing with specific aspects of child porn, these statutes were still too limited in scope because of proof problems, weak sanctions, and the inability to encompass all abusive acts. Consequently, due mainly to public outcry, a wave of legislation swept the country's statehouses in 1977 and 1978.

The Maryland legislature's response to the child pornography problem resulted in MD. ANN. CODE. art. 27, § 419A (1978). This statutory provision, entitled "Child Pornography", went into effect July 1, 1978, and states the following:

(a) Every person who solicits, causes, induces, or knowingly permits a person under 16 years of age to engage as a subject in the production of obscene matter is subject to the penalty provided in subsection (c).
(b) Every person who photographs or films a person under 16 years of age engaging in an obscene act is subject to the penalty provided in subsection (c).
(c) Every person who violates the provisions of this section is guilty of a felony and upon conviction shall be fined not more than $15,000 or imprisoned for 10 years, or both in the discretion of the court.

This statute shares a common function with similar statues: to impose more severe penalties than prior laws on persons who create explicit sexual portrayals of children (the distribution of such works is now covered by federal legislation). Through this approach, § 419A synthesizes the characteristics of two types of laws; those prohibiting the production of obscenity, and those prohibiting sex with children. On its face, this synthesis appears to be the result of the overwhelming intent of the Maryland State Legislature to protect helpless children from pornographic exploitation. Hence, the protection of community concerns and sensibilities appears only to be an incidental consideration.

The emphasis of § 419A lies in its prohibition against photographic depictions which, unlike sketches, necessarily involves an actual child. The statute does not explicitly make sexual conduct with a child a crime. This function is left to the child abuse statute (§ 35A) and rape and sexual offenses statutes, which impose stringent penalties on adults who engage in sex with children. Indeed, these laws remain the mechanism for prosecuting sex offenses against children. Instead, the child pornography statute imposes liability on those persons engaged in the promoting, creating, and photographing of the pornographic material, and attempts to diminish sexual abuse by dampening the economic supply and demand for sexual depiction of children.

Information from the Baltimore City State's Attorney's office indicated that in a commercial sense, child pornography is not a problem in Maryland. While there is some speculation regarding widespread circulation of child pornography in the male homosexual community, this problem is not a visible one and not such that pornographic materials will be found generally in the Maryland market place. In 1976, many distributors were preparing to flood the Maryland market place, particularly Baltimore City, with child pornographic materials. The Baltimore City Police Department conducted extensive raids on a number of warehouses, confiscating a large amount of undistributed pornographic material. However, the result of these raids were not successful judicially. In *Wheeler v. State,* 35 Md. App. 372, 370 A.2d 602, rev'd, 281 Md. 593, 380 A.2d 1052, *cert. denied,* 435 U.S. 997 (1977), the Maryland Court of Appeals declared MD. ANN. CODE art. 27, § 417(2) unconstitutional on the grounds of equal protection. Specifically, § 417(2) did not include an employee of any individual, partnership, firm, association, corporation, or other legal entity operating a theatre which shows motion pictures if the employee is not an officer thereof or has no financial interest therein other than receiving salary and wages. *Id.* at 608. To the extent that this statute prohibited some employees of legal entities from selling, distributing, publishing and printing obscene matter while allowing other employees to do so, the Court of Appeals declared this statute to be in violation of the equal protection clause of the Fourteenth Amendment. In 1978, § 417(2) was changed so that a "person" meant "any individual, partnership, firm, association, corporation, or other legal entity". The Maryland legislature's immediate response to the problem of child pornography, by enacting § 419A and changing § 417(2), coupled with police vigilance in this matter, has successfully deterred potential distribution of child pornography from penetrating the Maryland market place.

No case has challenged the legal viability of § 419A. However, a case worth noting is *St. Martin's Press v. Carey,* 440 F. Supp. 1196 (S.D.N.Y. 1973) rev'd. on other grounds, No. 77-7603 (2d Cir. Jan. 10, 1979). The cause of action arose from a challenge to New York's Penal Law, § 263.15 entitled "Promoting a Sexual Performance By a Child". This provision is similar to § 419A. This case, involving a suit for declaratory and injunctive relief, was brought by the publishers and retail sellers of a book to be of assistance to parents in educating their children about sex.

The plaintiffs argued that the statutory provision in question was unconstitutional for three reasons. First, the book satisfied the *Miller*[3] test in that it was a serious, artistic, educational, and scientific book designed to assist parents in educating their children about the physical and emotional aspects of sexual relations. Second, with respect to the state's interest in protecting children from being sexually exploited, this interest had no rational application to the book in question because the photographs contained in the book were taken in Germany. Hence, the statute's application to this book would be a denial of substantive due process since the legislature had exceeded its police powers. Third, this statutory provision infringed upon the constitutional privacy of parents to educate their offspring about sex.

The *St. Martin's Press* court found in favor of the plaintiffs. The court held that the book, *Show Me,* was not obscene under the *Miller* test because it did not, taken as a whole, lack serious literary, artistic or scientific value. Another determining factor in the court's decision was that prior decisions in three different states held *Show Me* not to be obscene. The argument, however, which the court found most persuasive was the plaintiff's substantive due process contention. The court, citing *Roe v. Wade,* 410 U.S. 113 (1973), and *Shelton v. Tucker,* 364 U.S. 479, held:

> Where a statute affects such fundamental rights as are at stake in this case, it must be narrowly drawn to express only the legitimate state interest at stake . . . and to foster them by the least drastic means possible . . . While New York's interest in protecting children from exploitation is both legitimate and important, the question remains whether it has pursued rational and least drastic means for effectuating that interest.

440 F. Supp. at 1205.

The court issued the preliminary injunction, but did not declare the statute unconstitutional. The court's ruling in *St. Martin's Press* is seminal because it dealt with a child pornography statute as a quasi-obscenity statute which looked for justification to the state's interest in the protection of its children. This court's rejection of a state's "any rational basis" contention may be pivotal in future litigation.

Litigation involving child pornography statutes may introduce other interesting legal issues. One such issue is whether child pornography should be viewed as pure speech and hence, allowable under First Amendment freedoms. The Supreme Court, in *United States v. O'Brien,* 391 U.S. 367 (1968), held that where speech and non-speech elements are combined in the same course of conduct, a legitimate governmental interest in regulating the non-speech elements can justify minor limitations in First Amendment freedoms. *Id.* at 376. If a statute, such as § 419A, is deemed to be a regulation of free speech, the applicable rule is found in *Brandenburg v. Ohio,* 395 U.S. 444 (1969). The *Brandenburg* Court held that a restriction of free speech may be justified by a showing of incitement to "imminent lawless action". *Id.* at 449. A strong argument can be made to support the notion that the nexus between the viewing of such pornographic materials and the danger of further child abuse by the viewer may be quite tenuous.

Still another issue to examine is whether the publisher or bookseller can be deemed an accomplice of the child abuser. Certainly, a legislative presumption that a publisher or bookseller is necessarily a principal in, or an aider and abettor of, child abuse that may be depicted in a book he publishes, distributes, or sells would be irrational and, hence, invalid as a violation of due process. If a producer of such materials is prosecuted under § 419A(2) or § 35A, the producer's relationship with the publisher or bookseller is too tenuous to constitute complicity within the legal meaning of the word. A publisher more often than not deals with manuscripts prepared by independent authors. And booksellers typically have no relationship of any kind with producers or authors, except as the purchaser of an independently produced product. Thus, an attempt to prosecute booksellers and publishers of child pornography as accomplices in child abuse will probably be unsuccessful given the existing criminal statutes in Maryland.

Potential defendants in child pornography litigation, unlike the litigants in *St. Martin's Press,* will be faced with an added dimension in their effort to dodge criminal prosecution. On February 6, 1978, Congress passed the "Protection of Children Against Sexual Exploitation Act of 1977". This Act has been incorporated into the United States Code (18 U.S.C. § 2251 *et seq.*). This law compounds the problems of a person engaged in the business of child pornography. It prohibits the sexual exploitation of children and the transportation of photographs or films in interstate or foreign commerce depicting sexual exploitation.

For the most part, Maryland has been able to steer clear of a serious child pornography problem. This condition is attributable to two factors: (1) police vigilance and (2) responsive legislation by the Maryland legislature. And with the enactment of federal legislation in this area, child pornography, in the commercial sense, should be well-controlled. But, if child porn does present a problem in Maryland, the legal community must be prepared to

[3] The current test for judging whether a work is obscene was articulated by Supreme Court in *Miller v. California,* 413 U.S. 15 (1973). The Court ruled that a work is obscene if: (a) the average person, applying contemporary community standards would find that the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

deal with the multitude of complex legal issues present in child pornography litigation.

Ed. Note — Because of the ongoing nature of efforts to control and eliminate child pornography in Maryland, Mr. Aiken's sources asked not to be idenfied more specifically than they have been in this article. However, all sources and all information have been verified.

ADDITIONAL READINGS

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TEENAGE EMANCIPATION: Living On Their Own—Legally

by Lu Clark

Used to be, a kid could just pack up a few things in a red knapsack and head down the river with his friend and his dog. The weather was warm, the terrain friendly, and the enemies basically nice guys. Hot cocoa and a hot bath awaited the intrepid wanderers.

Gradually the profile of the runaway has changed from a twelve year old boy to a teenager of either sex. Gradually the reason for running away emerged not as wanderlust but an intolerable home life. Trying to save himself from physical and mental abuse, the child solves the problem the only way he knows how: running away. But to what? For many children, prostitution; for most, drugs, poverty, filth, loneliness, and often death. The runaway's plight has been both sordid and well-documented. You may remember that the problem grew so great during the early Seventies that a national hotline was available for any runaway to call his parents, no charge, no questions asked.

The flood of runaways in the last two decades has ebbed and the Eighties brings a modern attempt to help those older children who cannot live at home. Rather than force them to escape, to live furtively outside the law until they are 18, a few states are allowing the teenager to leave home legally. California, under a new Emancipation of Minors Act, permits 14 year olds to be declared independent and receive the right to be treated as adults for most legal purposes. Included are such rights as being